Supreme Court, U.S.
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No. 87-462

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON CONDITIONAL CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO CROSS-APPEAL

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Cross-appellants challenge the district court's judgment (J.S. App. 1a-7a) holding that the references to "religious organizations" in the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.* (AFLA), may be severed from the constitutional remainder of the Act. The Secretary has previously docketed as No. 87-431 an appeal from the order of the district court declaring those references unconstitutional and enjoining the Secretary from enforcing the statute "as it pertains to 'religious organizations' " (87-431 J.S. App. 47a-49a). Although we believe that the district court correctly resolved the severability question, we agree that probable jurisdiction should be noted in the cross-appeal.

1. For the reasons stated in our jurisdictional statement docketed as No. 87-431, we believe that AFLA does not violate the Establishment Clause, either on its face or as applied. If the Court notes probable jurisdiction in No. 87-431 and ultimately concludes that the statute is not unconstitutional, there will be no reason to reach the question of severability.

2. If, on the other hand, the Court concludes that the references in AFLA to "religious organizations" do in fact violate the Establishment Clause, the severability issue will be presented. We believe that the district court correctly resolved the question of severability. As this Court recently put it, an "unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted" (*Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), slip op. 7 (footnote omitted)). The district court scrupulously applied that standard, concluding from its review of the text and history of the statute that "[t]he involvement of religious organizations was just one means of addressing th[e] problem [of teenage pregnancy] and not the primary reason why Congress enacted the AFLA" (J.S. App. 3a). The court found (*id.* at 5a) that "both the express language of the AFLA and its legislative history establish that Congress would have enacted the AFLA without its references to 'religious organizations.' " That finding is amply supported by the language of the statute, by its evident purpose, and by its legislative history.

3. We agree with cross-appellants, however, that probable jurisdiction should be noted with respect to the severability issue and that the question should be considered in conjunction with the Secretary's appeal from the district court's constitutional decision. Should the Court ultimately agree that AFLA is constitutional, it need not reach the severability issue.

It is therefore respectfully submitted that probable jurisdiction should be noted in the cross-appeal and the case considered in conjunction with the Secretary's appeal in No. 87-431.

CHARLES FRIED
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